The Coming of Age of Strict Products Liability in Ohio

In *Temple v. Wean United, Inc.*,[1] the Ohio Supreme Court took the final step in its march toward the adoption of a strict products liability cause of action in Ohio. Specifically, the court approved Restatement (Second) of Torts section 402A[2] as the standard for imposing strict liability upon a manufacturer for injuries suffered by users or consumers of products. It abolished the prior practice of recovery on the basis of "implied warranty in tort," although the elements of that theory appear to persist in the new strict products liability cause of action.

Notwithstanding this important step, Ohio law has not unreservedly embraced strict products liability doctrine. The *Temple* opinion leans toward the imposition of a "less than strict" standard, reminiscent of negligence law duties to exercise reasonable care, for the liability of a manufacturer for defects in the intended *design* of the product, but imposes true section 402A strict products liability standards upon defects arising in the *manufacturing* process. The purpose of this Note is to examine the evolution of a tort-based strict products liability cause of action for the injured product user in Ohio, with special attention to some of the strict products liability questions that will undoubtedly confront the Ohio courts in the future.

I. THE BASES OF STRICT PRODUCTS LIABILITY THEORY

The emergence of the strict tort cause of action as a major nationwide products liability theory of recovery has, in a legal sense, been accomplished with an astounding degree of celerity, and makes for a rather interesting legal tale.[3] More importantly, however, an understanding of the forces that hastened and shaped that evolution is essential to an evaluation of the importance of strict tort liability as a component of the body of products liability law. In large part, the development of strict products liability theory was a gradual judicial response to a combination of influences that have pressed the American courts since the Industrial Revolution. One major pressure was a heightened social concern over the explosive growth in numbers of manufactured goods and an accompanying increase in their capacity to injure purchasers of those goods, subpurchasers, incidental users, and bystanders. The interaction of this circum-

1. 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

2. RESTATEMENT (SECOND) OF TORTS § 402A (1965), *quoted at* note 76 *infra*.

3. This story has perhaps been most aptly told by Dean Prosser. *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter cited as Prosser, *The Assault*]; Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) [hereinafter cited as Prosser, *The Fall*]. *See also* Keeton, *Manufacturer's Liability: The Meaning of 'Defect' in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 559-60 (1969) [hereinafter cited as Keeton, *Manufacturer's Liability*].

stance with a growing judicial awareness of the shortcomings of existing modes of recovery for such product-caused injury in the modern commercial world has spawned contemporary "strict products liability" doctrine. Discussion of the evolution of strict products liability law should begin with an examination of the social and legal forces that coalesced to provide the favorable judicial atmosphere in which strict products liability theory could germinate and flourish.

A. *Policy Justifications for Greater Consumer[4] Protection in Twentieth Century Mass Markets*

The social anxieties that prodded courts in Ohio and elsewhere to embrace consumer-favored modifications in traditional modes of products liability recovery and to eventually adopt strict products liability can ultimately be traced back to the Industrial Revolution.[5] At the outset of that revolution, public sentiment favored the protection of growing industries, because of the prosperity those industries could generate. But explosive and sometimes troublesome strides in the commercial world gradually provoked a societal and judicial solicitude toward affording maximum protection to human life and health. Twentieth century marketing techniques that sought to create widespread consumer dependence upon a variety of mass-marketed products were paralleled by unprecedented strides in industrial technology that produced greater numbers and types of goods to satisfy that accelerating consumer demand. Increased numbers of products led to increases in the number of unreasonably dangerous products, and greater complexity and power in the goods distributed was often accompanied by a greater capacity to injure. As the deleterious side effects of commercial development in the twentieth century became increasingly more apparent to the courts, the industrial system achieved an economic stability that obviated any further need for judicial paternalism. For the most part, it was this societal awareness that

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4. The term "consumer" is used in this paper to mean a purchaser of goods at retail for use (as opposed to resale), a subsequent subpurchaser of the goods, an incidental user of the goods, or a bystander affected in some way by the goods.

5. Of the many extended treatments of the policy underpinnings of strict products liability law, this sampling is representative: Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965); Dickerson, *The Basis of Strict Products Liability*, 17 BUS. LAW. 157 (1961); Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEXAS L. REV. 81, 82-84 (1973); James, *General Products-Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957); Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 34-35 (1973) [hereinafter cited as Keeton, *Product Liability*]; Keeton, *Manufacturer's Liability*, *supra* note 3, at 561; Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1331-34 (1966); Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past* Vandermark, 38 S. CAL. L. REV. 30 (1965); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Prosser, *The Fall*, *supra* note 3, at 799-801; Prosser, *The Assault*, *supra* note 3; Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L.J. 825 (1973) [hereinafter cited as Wade, *On the Nature of Strict Tort Liability*]; Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965) [hereinafter cited as Wade, *Strict Tort Liability*].

induced the courts to assure consumers a more certain mode of protection against unreasonably dangerous products, one that would conform to modern commercial realities free from unnecessary legal impediments.

Although this emphasis upon the protection of physical welfare was the primary factor in hastening the emergence of strict tort liability, economic realities of the modern industrial world urged that the burden imposed upon injured consumers in redressing product-related injuries be lightened. The courts came to recognize that the supplier of goods was in the best economic position to bear the cost of redressing injuries caused by its products in the course of reasonable and ordinary use. In an equitable sense, the supplier of goods was the one to profit from their sale, and so should be the one to assume the cost of insuring against the possibility of injury from the use of defective goods. Of course, this cost was passed on to the consumer in the form of higher prices. Thus, the result of imposing strict products liability upon the supplier was to distribute the risks that accompany the increasing use of products throughout a product-dependent society by means of higher prices for those products, rather than visiting that cost upon the occasional unfortunate consumer who is injured.

As another policy justification, the decisions pointed out that imposing strict products liability upon the supplier might well produce a deterrent effect. The seller, who was best able to improve product safety, might find economic value in developing safer products. Once again, a portion of the cost of these safety developments could be passed on to the buyers. If safer products were developed, buyer and seller alike might benefit through less costly goods and a larger profit margin, as well as the attendant mitigation of human suffering.

Finally, the courts relied upon warranty theory in promoting strict products liability. By putting goods upon the market and by promoting them with twentieth-century mass-marketing techniques, the suppliers of the goods had induced consumer sales, at least in part, by representing those goods as wholesome and noninjurious. Consumers bought the goods with expectations that they would be safe, and the supplier would be held to a strict accounting when those expectations were frustrated by harmful products.

B. *Difficulties Associated With Traditional Theories of Products Liability Recovery*

1. *Negligence*

Coupled with the social policy factors that contributed to the adoption of more prophylactic consumer protection measures was a sharpened judicial sensitivity to the imperfections of traditional theories of products liability recovery, such as negligence theory. There is considerable truth in the observation that "[i]t is often difficult, or even impossible, to prove

negligence on the part of a manufacturer or supplier."[6] The plaintiff in a negligence suit must show not only a shortcoming in the product that made it unreasonably dangerous, but also that such a product became defective or was allowed to be sold in its defective condition because of the manufacturer's or seller's failure to exercise the care of a reasonable man of ordinary prudence.[7] The plaintiff faces a sizable task in establishing a lack of due care on the part of the manufacturer of a product. As a first hurdle, the increasing specialization of industry might mean that a single product could be made up of several components produced by different manufacturers; the duty of the manufacturer of the final product is often limited only to testing and inspecting that final product.[8] Thus, the plaintiff would have difficulty in establishing that a particular defendant was responsible for the injury. Even if the product were completely manufactured by one defendant, considerable time and expense would be required to show, as the plaintiff must,[9] that the manufacturer failed to exercise reasonable care in choosing materials for the product, and in designing, constructing, and inspecting the product.[10] The doctrine of *res ipsa loquitur* may relieve the plaintiff of the burden of establishing specific evidence of negligent acts by raising an inference of negligence,[11] if the accident is such that it would not have occurred if ordinary reasonable care had been exercised; but the *res ipsa loquitur* doctrine has been subject to special disabilities in the products liability area.[12] Even if *res ipsa loquitur*

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6. Wade, *supra* note 5, at 826.

7. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 150 (4th ed. 1971).

8. *See* 2 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 7:8, at 124-26 (2d ed. 1974).

9. 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY §§ 6-8 (1978).

10. *See* Keeton, *Products Liability—Problems Pertaining to Proof of Negligence*, 19 SW. L.J. 26 (1965); Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350, 1362 (1966).

11. To invoke the doctrine of *res ipsa loquitur*, three conditions must be met:

1. The event [the injury resulting from the use of a product] must be of a kind which ordinarily does not occur in the absence of someone's negligence;

2. It must be caused by an agency or instrumentality within the exclusive control of the defendant;

3. It must not have been due to any voluntary action or contribution on the part of the plaintiff.

W. PROSSER, *supra* note 7, § 39, at 214. In most jurisdictions, satisfaction of the conditions precedent to invocation of the *res ipsa loquitur* doctrine will allow, but not compel, the jury to infer that the defendant was negligent. The doctrine in those jurisdictions allows the plaintiff to avoid having a verdict directed against him after he has introduced evidence of the necessary conditions, and no burden of persuasion is shifted to the defendant. The procedural effect of a *res ipsa loquitur* instruction is not uniform, however, and some jurisdictions give the invocation of the *res ipsa loquitur* doctrine greater weight, *e.g.*, by holding that it creates a rebuttable presumption of negligence, shifting to the defendant the burden of persuasion to meet or overcome the presumption. *Id.* § 40.

12. One requirement for invocation of *res ipsa* is that the injury resulting from the use of a product must be caused by an instrumentality "within the exclusive control of the defendant." *See* note 11 *supra*. The observation has been made that "[t]o the extent that a court takes a stringent view and refuses to apply *res ipsa loquitur* unless the product is in the physical possession of the defendant, it will be relatively more difficult for a plaintiff to utilize *res ipsa loquitur* to show the negligence of the defendant." Note, *Products Liability: A Synopsis*, 30 OHIO ST. L.J. 551, 561 (1969). The reluctance of the courts to apply *res ipsa loquitur* liberally has been explained in these terms:

were to raise an inference of negligence, that inference could be rebutted by a showing of proper care on the part of the defendant.[13] Furthermore, when *res ipsa loquitur* is not applicable, the plaintiff encounters substantial evidentiary problems in establishing a standard of care in a particular product area and its breach by the defendant.[14]

Beyond these problems that burden a negligence suit against *any* seller of a product, such a suit is almost futile in asserting liability against a middleman, that is, the distributor, wholesaler, or retailer, as opposed to the manufacturer. If the middleman knows of a defect of which the consumer will not be aware, he must warn the consumer. As a rule, however, the middleman has no duty to inspect or test goods he sells,[15] even if with proper testing he might have discovered such a defect.[16] This is especially true when the product is sold in its original package or container, for the seller in that case is a mere conduit between the manufacturer and buyer.[17] Even in regard to a seller of a product not sold in its original package, there is usually no duty to discover latent defects

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> The fact that plaintiff's injury was received at a time when the product was out of the manufacturer's control is extremely important as regards an inference of negligence against the manufacturer. The nature of the accident in itself will not normally justify a finding that the accident was the kind that would not ordinarily occur without negligence on the part of the manufacturer. For example, evidence that a mechanic and body finisher was injured when an abrasive disc grinder manufactured by the defendant broke and struck the plaintiff was regarded as insufficient as a matter of law. So also, proof by the plaintiff that he was injured by the escape of boiling water from a vaporizer manufactured by defendant was not, without evidence as to why the water escaped, a sufficient foundation for a finding of negligence.

Keeton, *supra* note 10, at 35-36 (footnotes omitted). For further discussion of the problems of utilizing the *res ipsa loquitur* doctrine in establishing negligence in products liability cases, see Carr, *Res Ipsa Loquitur in Ohio: Does Any "Thing" or "Control" Speak For Itself*, 29 OHIO ST. L.J. 399 (1968); Comment, *supra* note 10.

13. *See* discussion in Ryan v. Zweck-Wollenberg Co., 266 Wis. 64 N.W.2d 226 (1954). *See also* discussion at 1 L. FRUMER & M. FRIEDMAN, *supra* note 9, § 12.03[7], at 336.

14. *See* authorities cited at note 10 *supra*. Prosser suggests this practical reason for the eagerness with which plaintiffs' attorneys urge the courts to embrace the theory of strict liability:

> No writer seems to have suggested that the answer lies in the preparation for trial, the negotiations for settlement, and the amount of the verdict. So long as the negligence issue remains in the case, it must be litigated, and plaintiff's counsel must be prepared to examine and cross-examine witnesses, including even experts. He may even be forced to look up a little law, which is a thing from which some personal injury lawyers notoriously shrink. So long as there is the possibility that negligence may not be found, the defendant is encouraged by vain hopes, and the plaintiff gnawed by lingering doubts; and a case which *can* be decided for the defendant is worth less, in terms of settlement, than one which can not. And so long as the defendant can introduce evidence of his own due care, the possibility remains that it may influence the size of the verdict, as jurymen impressed with it stubbornly hold out for no liability, or a smaller sum.

Prosser, *The Assault, supra* note 3, at 1116.

15. *See* RESTATEMENT (SECOND) OF TORTS § 402 (1965). *See also* cases cited at 1 R. HURSH & H. BAILEY, *supra* note 8, § 2:37, at 238 n.35; Annot., 6 A.L.R.3d 1 (1966).

16. Continental Cas. Co. v. Belknap Hardware & Mfg. Co., 281 S.W.2d 914 (Ky. 1955); Zesch v. Abrasive Co., 353 Mo. 558, 183 S.W.2d 140 (1944) (dictum).

17. Linker v. Quaker Oats Co., 11 F. Supp. 794 (N.D. Okla. 1935); Guglielmo v. Klausner Supply Co., 158 Conn. 308, 259 A.2d 608 (1969); Alfieri v. Cabot Corp., 17 App. Div. 2d 455, 235 N.Y.S.2d 753 (1962), *aff'd*, 13 N.Y.2d 1027, 245 N.Y.S. 2d 600 (1963). *See also* 1 R. HURSH & H. BAILEY, *supra* note 8, § 2:39, at 244-45.

through proper testing, and the middleman will not be held liable for injuries arising from those defects.[18]

As a practical matter, the greatest obstacle to recovery for a plaintiff founding his claim upon a manufacturer's negligence is his own failure to observe a reasonable standard of care with respect to his own safety, which failure contributes to his own injuries. Such contributory negligence on the part of a plaintiff disentitles him to pursue a negligence suit against the maker of the product.[19]

2. *Warranty*

Recovery under the other traditional products liability cause of action, breach of warranty, was also complicated by rules that made recovery for the injured product user problematic. During the evolutionary stages of strict products liability doctrine, redress predicated upon an express or implied warranty was subject in most states, including Ohio,[20] to the provisions of the Uniform Sales Act.[21] Decisions under the Act followed traditional notions that, in order to recover upon a warranty, the plaintiff must show reliance in fact upon the seller's express or implied warranty.[22] Thus, for example, the buyer of a bottle of liniment was denied recovery against the manufacturer upon an express warranty on the label, because the buyer had not actually relied upon the warranty at the time of purchase.[23] This obstacle to recovery has largely disappeared as the states, including Ohio, have adopted the Uniform Commercial Code. Under the Code, the implied warranty of merchantability attaches as a matter of law; its existence is not conditioned upon a showing of reliance by the injured user of a product.[24]

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18. Burgess v. Montgomery Ward & Co., 264 F.2d 495 (10th Cir. 1959) (applying Kansas law); McMeekin v. Gimbel Bros., 223 F. Supp. 896 (W.D. Penn. 1963) (applying Pennsylvania law); Odum v. Gulf Tire & Supply Co., 196 F. Supp. 35 (N.D. Fla. 1961) (applying Florida law); Lowe v. American Mach. & Foundry Co., 132 Ga. App. 572, 208 S.E.2d 585 (1974); Peltier v. Seabird Indus., Inc., 304 So. 2d 695 (La. App. 1974), *cert. denied*, 309 So. 2d 343 (La. 1975); Levis v. Zapolitz, 72 N.J. Super. 168, 178 A.2d 44 (1962); Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co., 18 N.C. App. 689, 198 S.E.2d 88 (1973); Martin v. Schoonover, 13 Wash. App. 48, 533 P.2d 438 (1975).

19. *See* W. PROSSER, *supra* note 7, § 65, at 416-27. It should be observed, however, that in the jurisdictions that have adopted comparative negligence principles, the plaintiff's own negligence will not bar his negligence suit, but rather will only reduce the recoverable damages. *See id.* § 67.

20. 99 Ohio Laws 413 (1908), (repealed and superseded by the adoption of Article 2 of the Uniform Commercial Code in Ohio on July 1, 1962, codified at OHIO REV. CODE ANN. §§ 1302.01-.98 (Page 1962)).

21. 1 UNIFORM LAWS ANN. §§ 12-16 (1950).

22. *See, e.g.*, Maryland Cas. Co. v. Independent Metal Prod. Co., 203 F.2d 838 (8th Cir. 1953) (applying Nebraska law); Pedroli v. Russell, 157 Cal. App. 2d 281, 320 P.2d 873 (1958); Bleacher v. Bristol-Myers Co., 163 A.2d 526 (Del. 1960); Continental Cas. Co. v. Belknap Hardware & Mfg. Co., 281 S.W.2d 914 (Ky. 1955); Oppenheimer v. Sterling Drug, Inc., 7 Ohio App. 2d 103, 219 N.E.2d 54 (1964); Kennedy-Ingalls Corp. v. Meissner, 11 Wis. 2d 371, 105 N.W.2d 748 (1960).

23. Randall v. Goodrich-Gamble Co., 238 Minn. 10, 54 N.W.2d 769 (1952). *Accord*, Torpey v. Red Owl Stores, Inc., 228 F.2d 117 (8th Cir. 1955); Sears, Roebuck & Co. v. Marhenke, 121 F.2d 598 (9th Cir. 1941); Dobbin v. Pacific Coast Coal Co., 25 Wash. 2d 190, 170 P.2d 642 (1946).

24. OHIO REV. CODE ANN. § 1302.27 (Page 1962); U.C.C. § 2-314 (1972). The Uniform Commercial Code became effective in Ohio in 1962. 129 Ohio Laws 13 (1961) (effective July 1, 1962).

Another obstacle to recovery upon a theory of breach of warranty under the Uniform Sales Act was that a buyer could not recover if he failed to give notice of the breach to the seller.[25] Uniform Commercial Code section 2-607(3)(a) preserves this rule, barring the buyer from any remedy unless he notifies the seller of any breach within a reasonable time after he discovers or should have discovered it.[26]

Perhaps the most imposing barrier to recovery upon a warranty theory is the seller's right to disclaim any implied warranties, recognized under the Uniform Sales Act[27] and the Uniform Commercial Code.[28] Although these disclaimers have recently been successfully attacked on various grounds[29] and often involve problems of unconscionability under section 302 of the Code,[30] the careful seller and his resourceful attorney may nevertheless be able under the Code to exclude warranties in a conscionable fashion.[31]

3. *The Privity Bar*

Although the foregoing aspects of negligence and warranty recovery often contributed to the frustration of consumer remedies for injuries sustained in the course of using unwholesome products, the most formidable and consistent bar to consumer recovery was the traditional requirement that the injured plaintiff be in privity of contract with any potential defendant. The absence of privity served as an absolute roadblock to the plaintiff's suit in negligence, and the prospect that the manufacturer or seller of a product could be liable in a negligence suit to users other than those in privity of contract with him suggested to Lord Abinger "the most absurd and outrageous consequences, to which I can see no limit."[32] The reticence of the courts to expose manufacturers to liability beyond the

25. 1A UNIFORM LAWS ANN. § 49 (1950).

26. OHIO REV. CODE ANN. § 1302.65 (Page 1962); U.C.C. § 2-607(3)(a) (1972).

27. 1A UNIFORM LAWS ANN. § 71 (1950).

28. OHIO REV. CODE ANN. § 1302.29 (Page 1962); U.C.C. § 2-316 (1972).

29. *See, e.g.*, Marion Power Shovel Co. v. Huntsman, 246 Ark. 152, 437 S.W.2d 784 (1969); Guntert & Zimmerman Sales Div., Inc. v. Thermoid Co., 216 Cal. App. 2d 771, 31 Cal. Rptr. 99 (1963); Uganski v. Little Giant Crane & Shovel, Inc., 35 Mich. App. 88, 192 N.W.2d 580 (1971); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Dobias v. Western Farmers Ass'n, 6 Wash. App. 194, 491 P.2d 1346 (1971).

30. *See, e.g.*, Ford Motor Co. v. Tritt, 244 Ark. 883, 430 S.W.2d 778 (1968); Collins v. Uniroyal, Inc., 126 N.J. Super. 401, 315 A.2d 30 (1973), *aff'd*, 64 N.J. 260, 315 A.2d 16 (1974); Sarfati v. M.A. Hittner & Sons, 35 App. Div. 2d 1004, 318 N.Y.S.2d 352 (1970), *appeal dismissed*, 28 N.Y.2d 808, 270 N.E.2d 729, 321 N.Y.S.2d 912 (1971); Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd., 29 App. Div. 2d 303, 287 N.Y.S.2d 765 (1968), *rev'd on other grounds*, 25 N.Y.2d 451, 255 N.E.2d 168, 306 N.Y.S.2d 934 (1969); Walsh v. Ford Motor Co., 59 Misc. 2d 241, 298 N.Y.S.2d 538 (1969).

31. OHIO REV. CODE ANN. § 1302.29, Comments 2 & 3 (Page 1962); U.C.C. § 2-316, Comments 2 & 3 (1972). Professor Shanker contends that most of the suggested differences between recovery in strict tort or upon warranty theory are illusory, yet even he concedes that the availability of disclaimer as a defense in warranty actions, but not in strict tort liability actions, represents a significant difference between the two. Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communications Barriers*, 17 CASE W. RES. L. REV. 5 (1965).

32. Winterbottom v. Wright, 10 M. & W. 109, 114, 152 Eng. Rep 402, 405 (Exch. 1842).

bounds of absolute privity clearly reflected the nineteenth century public policy of solicitude for the growth of industrial and commercial enterprise, even at the expense of consumer protection.[33]

Recovery upon an implied or express warranty was governed by the provisions of the Uniform Sales Act.[34] The definitions of "buyer" and "seller" in the Act included only the immediate parties to the contract.[35] Hence, the causes of action accorded the buyer under the Act could be asserted only against parties with whom he was in privity.[36] Nor did the adoption of the Uniform Commercial Code extend warranty protection much beyond the boundaries of privity. As originally promulgated, section 2-318 of the Code[37] allowed recovery upon a breach of warranty theory from any seller of the product by the buyer, his family or household, and the guests in his home, if it was reasonably foreseeable that any of them might use the goods. Beyond these parties, the Code professed to be neutral about whether the seller's warranties given to a "buyer who resells" extended to others in the "distributive chain."[38] It was suggested that the Code included actual subpurchasers of the original buyer within the protection of its warranties, but that nonpurchasers remained outside the coverage of these warranties.[39] Such incidental users of a product, other than a guest in the buyer's home or a member of his family or household, could not avail themselves of Code warranty protection when injured by dangerous products. Although amendments to section 2-318 have offered the states the alternative of extending the protection of Code warranties to more remote parties,[40] the Ohio statute[41] conforms to the original version.

Judicial appreciation of both the heightened social concern for the protection of those injured by unreasonably dangerous products, prompted largely by developments in the Industrial Revolution, and the problematic aspects of traditional products liability causes of action that reduced their utility to injured consumers provided a climate favorable to

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33. *See, e.g.*, Goodlander Mill Co. v. Standard Oil Co., 63 F. 400 (7th Cir. 1894); Daugherty v. Herzog, 44 N.E. 457 (Ind. 1896); Curtain v. Somerset, 140 Pa. 70, 21 A. 244 (1891).

34. *See* note 20 *supra*.

35. 1A UNIFORM LAWS ANN. § 76 (1950): " 'Buyer' means a person who buys or agrees to buy goods or any legal successor in interest of such person . . . . 'Seller' means a person who sells or agrees to sell goods, or any legal successor in interest of such person."

36. *See* cases cited in 1 S. WILLISTON, SALES § 244, at 645-50 (rev. ed. 1948). *See also* Prosser, *The Assault, supra* note 3, at 1127-28, 1129 n.174.

37. Section 2-318 originally read:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

U.C.C. § 2-318 (1962 version).

38. U.C.C. § 2-318, Comment 3 (1962 version).

39. Withers v. Sterling Drug, Inc., 319 F. Supp. 878 (S.D. Ind. 1970); Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 375, 205 N.E.2d 92, 93 (1965), *aff'd*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966). *But see* Shanker, *supra* note 31, at 25-27.

40. U.C.C. § 2-318, Alternatives B & C (1972).

the gradual emergence of strict products liability doctrine in the twentieth century. This Note will now examine the course Ohio law has taken in response to these forces, and the extent to which the Ohio courts had embraced the strict products liability cause of action prior to *Temple*.

II. THE OHIO RESPONSE TO PROBLEMS IN THE PRODUCTS LIABILITY AREA PRIOR TO *Temple*

A. *A Partial Breach of the Privity Bar*

The most serious impediment to products liability recovery for the injured consumer was the absolute demand of privity between the plaintiff and any prospective defendant. The privity requirement in negligence suits was the first to be subjected to judicial erosion, as the "absolute" rule of privity became a "general" rule with "exceptions." The most important of these exceptions was that a manufacturer owed a duty of reasonable care to anyone who might be expected to use a chattel, provided the chattel was inherently or imminently dangerous, as in the case of explosives or poisonous drugs.[42] Finally, in 1916 Judge Cardozo penned the exception that swallowed the rule. Purporting merely to "extend" the category of "inherently" dangerous chattels to those that became so if negligently made, Cardozo wrote: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."[43] A blitz of cases picked up Cardozo's theme, and a general rule evolved that a manufacturer or seller of a product for remuneration was always liable for his negligence in placing in the stream of commerce a product that caused injury as a proximate result of the supplier's negligence, irrespective of whether the injured party was a purchaser, a member of the purchaser's family, a subsequent purchaser, a user, or a bystander.[44]

Although in most jurisdictions Judge Cardozo's opinion laid waste to the general rule that a showing of privity was necessary to maintain a negligence suit, the Ohio courts refused to give *MacPherson* such an expansive reading. In *White Sewing Machine Co. v. Feisel*,[45] the Lucas County Court of Appeals fashioned a limited exception to the privity requirement in negligence actions by holding that a manufacturer could be

41. OHIO REV. CODE ANN. § 1302.31 (Page 1962).

42. Thomas v. Winchester, 6 N.Y. 397 (1852). Trouble with this formulation arose in determining which articles were "inherently" dangerous. *See, e.g.*, W. PROSSER, *supra* note 7, § 96, at 642 & nn.15-18. In Ohio, see Davis v. Guarnieri, 45 Ohio St. 470, 15 N.E. 350 (1887).

43. MacPherson v. Buick Motor Co., 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916).

44. *See* Prosser, *The Assault*, *supra* note 3, at 1100-03. *See also* Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees*, 45 L. Q. REV. 343 (1929); Feezer, *Tort Liability of Manufacturers*, 19 MINN. L. REV. 752 (1935); Feezer, *Tort Liability of Manufacturers and Vendors*, 10 MINN. L. REV. 1 (1925); Jeanblanc, *Manufacturer's Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937); Russell, *Manufacturer's Liability to the Ultimate Consumer*, 21 KY. L.J. 388 (1933).

45. 28 Ohio App. 152, 162 N.E. 633 (Lucas County 1927).

held liable for its negligence in producing injury-causing goods despite the absence of privity, when those goods were rendered "imminently dangerous" by its negligence. This was as far as the Ohio courts were willing to go, however, and subsequent decisions declined to waive the privity requirement, except when the manufacturer's negligence resulted in an "imminently dangerous" product.[46] This narrow reading of *MacPherson* persisted in Ohio for some forty years, and only recently have the Ohio courts acceded to the general rule that a manufacturer can be held liable to parties for his negligence in producing a good, when the defect in the good causes injury to person or property, despite the absence of privity.[47]

The growing judicial concern for the welfare of product users that led to the relaxation of privity requirements in defining the class of potential defendants in negligence actions led also to a redefinition of the duties to be imposed on those who sold food and drink. Since the thirteenth century, the common law had recognized that the seller of victuals was vested with special responsibilities to ensure that the goods he sold would be fit for human consumption without injury.[48] In the face of mounting controversy over the lack of observable health standards in the American food industry,[49] several American jurisdictions,[50] including Ohio,[51] developed an exception to the privity requirement in suits against food producers, holding that a manufacturer of food products impliedly warranted to the general public that its foods were wholesome and safe, and that such a manufacturer was liable for breach of this implied warranty to anyone injured by the use of the product. The formulations employed by the Ohio courts to sidestep the privity requirements in these cases continued, however, to recognize the contractual nature of warranty liability. In one instance, the purchaser of baked goods from a retailer was cast

46. Schindley v. Allen-Sherman-Hoff Co., 157 F.2d 102 (6th Cir. 1946) (applying Ohio law); Blissenbach v. Yanko, 90 Ohio App. 557, 107 N.E.2d 409 (Mahoning County 1951). Despite the refusal of these cases to allow a negligence claim because evidence was lacking that the product was "imminently" dangerous at the time of the sale, the Ohio courts have found products inherently dangerous or imminently so because of the manufacturer's negligence in a wide variety of situations, and, as a consequence, have allowed the negligence suit to proceed. *See, e.g.*, Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953) (electric blanket); Sicard v. Kremer, 133 Ohio St. 291, 13 N.E.2d 250 (1938) (hair dye); Mobberly v. Sears, Roebuck & Co., 4 Ohio App. 2d 126, 211 N.E.2d 839 (Stark County 1965) (portable grain elevator); White Sewing Mach. Co. v. Feisel, 28 Ohio App. 152, 162 N.E. 633 (Lucas County 1927) (sewing machine); DiVello v. Gardner Mach. Co., 46 Ohio Op. 161, 102 N.E.2d 289 (C.P. Cuyahoga County 1951) (grinding wheel).

47. Domany v. Otis Elevator Co., 369 F.2d 604 (6th Cir. 1966) (applying Ohio law), *cert. denied*, 387 U.S. 942 (1967); Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

48. *See* Prosser, *The Assault, supra* note 3, at 1103-06.

49. *See* Regier, *The Struggle for Federal Food and Drugs Legislation*, 1 LAW & CONTEMP. PROB. 3 (1933).

50. *See, e.g.*, Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913). Prosser estimates that 22 of 36 states to consider the question have followed *Mazetti* and imposed some sort of special liability upon the food producers or vendor. Prosser, *The Assault, supra* note 3, at 1107-10.

51. Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (Cuyahoga County 1928); Mahoney v. Shaker Square Beverages, Inc., 64 Ohio L. Abs. 200, 102 N.E.2d 281 (C.P. Cuyahoga County 1951); Tennebaum v. Pendergast, 55 Ohio L. Abs. 231, 90 N.E.2d 453 (C.P. Franklin County 1948).

as a third-party beneficiary of the implied warranty attached to the contract of sale between the bakery and the retailer, which enabled the injured purchaser to sue on that implied warranty.[52] In other cases, the definition of a "buyer" entitled to recover under the Uniform Sales Act was construed broadly to include the purchaser's wife[53] and members of the purchaser's family and household.[54]

Outside the food and drink cases, however, the privity requirement in warranty suits stood firm. Although the courts of Cuyahoga County had taken unprecedented steps in extending the warranty liability of manufacturers to nonprivy parties,[55] the Supreme Court of Ohio in *Wood v. General Electric Co.*[56] rejected the theory of these cases and refused to allow the purchaser of an electric blanket from a retail store to assert an implied warranty claim against the manufacturer of the blanket with whom he was not in privity. The supreme court subsequently reaffirmed the rule that a claim based upon an implied warranty could only be brought by a party in privity with the seller to whom the implied warranty is attributed.[57]

Thus, the injured consumer in Ohio in 1957 could resort to an implied warranty action against a manufacturer or other seller with whom he was not in privity only under limited circumstances. A negligence suit against a manufacturer or seller was possible in the absence of privity only if the product involved was inherently dangerous or had become imminently so as a result of the manufacturer's negligence, or if the product involved was food or drink.[58]

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52. Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (Cuyahoga County 1928).

53. Tennebaum v. Pendergast, 55 Ohio L. Abs. 231, 90 N.E.2d 453 (C.P. Franklin County 1948).

54. Mahoney v. Shaker Square Beverages, Inc., 64 Ohio L. Abs. 200, 102 N.E.2d 281 (C.P. Cuyahoga County 1951).

55. In DiVello v. Gardner Mach. Co., 65 Ohio L. Abs. 58, 102 N.E.2d 289 (C.P. Cuyahoga County 1951), the court refused to strike the implied warranty claim of an employee of the purchaser asserted against the manufacturer of a grinding wheel, which had disintegrated during use and injured the employee. The protection of the implied warranty was deemed to extend to the purchaser's employee.

In Kruper v. Procter & Gamble Co., 113 N.E.2d 605 (Ohio Ct. App. Cuyahoga County 1953), the court of appeals allowed a purchaser of a bar of soap with a wire embedded in it to proceed directly against the manufacturer on an implied warranty claim despite the absence of privity, reasoning that notions of privity "should not protect one who sells unmerchantable goods where inspection will not disclose the defect." *Id.* at 608.

56. 159 Ohio St. 273, 112 N.E.2d 8 (1953).

57. Welsh v. Ledyard, 167 Ohio St. 57, 146 N.E.2d 299 (1957).

58. *See* Wolfe v. Great Atl. & Pac. Tea Co., 143 Ohio St. 643, 56 N.E.2d 230 (1944); Canton Provision Co. v. Gauder, 130 Ohio St. 43, 196 N.E. 634 (1935); Clark Restaurant Co. v. Simmons, 29 Ohio App. 220, 163 N.E. 210 (Cuyahoga County 1927). These cases have allowed recovery for negligence by a party other than the immediate purchaser against the retailer and against the food producer, despite the absence of privity. The rationale for this aberration is twofold. First, the negligence in producing and selling unwholesome food results in a product "imminently dangerous" to the consumer, and thus the privity requirement is waived pursuant to *White Sewing Machine*. Second, the Ohio courts have found it negligent *per se* to produce and sell defective food products in light of Ohio's pure food laws, OHIO REV. CODE ANN. §§ 3715.01-.99 (Page 1971), and have extended this protection to all food consumers injured by contaminated food, regardless of privity.

Despite this initial reluctance to extend the implied warranty theory of liability beyond the food cases, some courts slowly began to apply the theory to products other than foods.[59] The Ohio courts took the next important step by imposing an implied warranty of fitness upon the manufacturer of products intended for intimate bodily use.[60] In *Rogers v. Toni Home Permanent Co.*,[61] the Ohio Supreme Court allowed the purchaser of a permanent wave solution to proceed directly against the manufacturer of the solution on a theory of express warranty although plaintiff had purchased the solution from a local retailer and clearly enjoyed no privity with the manufacturer. The court took this unprecedented step with little difficulty, deeming it "but logical" that foodstuffs and products intended for intimate bodily use posed similar capabilities for harm, concluding that those profiting by their sale should be subjected to a similar form of liability, one stricter than negligence. Nor, in the court's view, should the injured product user be confined to pressing this "warranty" theory against only those parties with whom he was in privity of contract.[62]

This decision did not, however, complete the evolution of strict liability law; the court stressed that the injured buyer had, to her injury, relied upon express representations made by the defendant in the course of an extensive national advertising campaign. The court reasoned that when the buyer relies on such inducements, and is injured when the

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59. Tentative extensions of strict liability doctrine were made by holding the seller of animal food liable on an implied warranty without requiring privity or negligence. *See* McAfee v. Cargill, Inc., 121 F. Supp. 5 (S.D. Cal. 1954); Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959).

60. Kruper v. Procter & Gamble Co., 113 N.E.2d 605 (Ohio Ct. App. Cuyahoga County), *rev'd on other grounds*, 160 Ohio St. 489, 117 N.E.2d 7 (1954). In *Kruper*, the court of appeals for Cuyahoga County ruled that the injured user of a bar of soap with an embedded piece of wire had stated a proper cause of action against the manufacturer based upon the breach of an "implied warranty of merchantability," despite the absence of privity. The court specifically held:

> It should also be remembered that the implied warranty of merchantability is in a sense one imposed by law although frequently spoken of as quasi-contractual. In the case of *Ward Baking Co. v. Trizzino* . . . , the court in effect held that the implied warranty of the manufacturer was for the benefit of the ultimate consumer. The question of privity should not protect one who sells unmerchantable goods where inspection will not disclose the defect.

Id. at 608. *Accord*, Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (Cuyahoga County 1958) (permanent wave solution).

61. 167 Ohio St. 244, 147 N.E.2d 612 (1958).

62. The court's rationale for allowing recovery upon this "warranty" theory despite the absence of privity was concise and simple:

> It must be confessed that the prevailing view is that privity of contract is essential in an action based on a breach of an express or implied warranty, and that there is no privity between the manufacturer of an article and the ultimate purchaser thereof from a retailer, where the ultimate purchaser was in no way a party to the original sale . . . .
>
> However, there is a growing number of cases, which, as an exception to the general rule, hold that as to food stuffs and medicines . . . a warranty of fitness for human consumption carries over from the manufacturer or producer to the ultimate consumer, regardless of privity of contract . . . .
>
> It would seem but logical to extend the rule last cited to cosmetics and other preparations, which are sold in sealed packages and are designed for application to the bodies of humans or animals.

Id. at 246-47, 147 N.E.2d at 614.

product fails to conform to the representations made about its qualities, lack of privity should not bar suit against the manufacturer who made such express warranties. Thus, the buyer's cause of action arose through her proven reliance on the seller's express representations about the product that caused her injuries, rather than solely through the shortcomings of the product itself. The court did, however, characterize the express warranty recovery as a tort-based mode of redress, and not a contractual one bound up with notions of privity, correctly pointing out that the action on a breach of warranty originally sounded in tort as a means to give relief for the breach of a duty assumed by a seller.[63]

Although the dam restraining the onslaught of strict liability had sprung a considerable leak after *Rogers*,[64] it refused to buckle until 1960 when the Supreme Court of New Jersey handed down the now famous *Henningsen v. Bloomfield Motors, Inc.*[65] The New Jersey Supreme Court held both the manufacturer and the retailer of an automobile liable to the purchaser's wife, who was injured when the car suddenly veered into a wall, without any showing of privity or negligence. Finding the same potential for harm in "a fly in a bottle of beverage and a defective automobile,"[66] the court refused to honor any distinction between the two. Still phrasing the basis for recovery in terms of an "implied warranty," the court extended protection to Mrs. Henningsen, despite the fact that she was completely outside the chain of title, reasoning that privity barriers should not preclude a suit by an injured product user against a seller of a product that could be dangerous to life or limb when defectively made,[67] because an "implied warranty that it is reasonably suitable for use . . . accompanies [such a product] into the hands of the ultimate purchaser."[68]

Henningsen did not, however, establish a new tort-based theory divorced from rules of contract law, for recovery was still premised upon the breach of an implied warranty. Although originally sounding in tort, an action for breach of warranty had by this time been held to lie in contract,[69] and so recovery was allowed according to contract law principles. These rules made recovery difficult, and the court in *Henningsen* was put to some toil to hold that a warranty disclaimer included in the contract was void as a matter of law by reason of unconscionability,[70] and therefore could not bar plaintiff's action.

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63. *Id.* at 247-48, 147 N.E.2d at 614-15.

64. *See, e.g.*, Continental Copper & Steel Indus., Inc. v. E.C. "Red" Cornelius, Inc., 104 So. 2d 40 (Fla. Dist. Ct. App. 1958); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959); Jarnot v. Ford Motor Co., 191 Pa. Super. Ct. 422, 156 A.2d 568 (1959).

65. 32 N.J. 358, 161 A.2d 69 (1960).

66. *Id.* at 383, 161 A.2d at 83.

67. *Id.* at 413, 161 A.2d at 99-100.

68. *Id.* at 384, 161 A.2d at 84.

69. *See* Prosser, *The Assault, supra* note 3, at 1126-34; Prosser, *The Fall, supra* note 3, at 801.

70. 32 N.J. at 385-406, 161 A.2d at 84-96.

These problems were finally eliminated by the Supreme Court of California in *Greenman v. Yuba Power Products, Inc.*,[71] in which plaintiff recovered for injuries suffered when he was struck by a piece of wood thrown from his new "Shopsmith" machine. The court rejected the manufacturer's contention that plaintiff's action was barred by his failure to give notice of the alleged breach of warranty within a "reasonable time," as required by California law,[72] holding that the notice requirement was not applicable "in actions by injured consumers against manufacturers with whom they have not dealt."[73] The manufacturer's liability was not limited by contract or warranty rules, but rather was grounded strictly in tort law:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . . Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law (. . . *Rogers v. Toni Home Permanent Co.* . . .) and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products (*Henningsen v. Bloomfield Motors, Inc.* . . .) make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.[74]

Judicial acceptance of the tort-based "strict liability" action was explosive,[75] and by 1964 the American Law Institute had approved it as the majority rule in section 402A.[76]

Although many courts have wrestled with strict products liability doctrine since its inception in *Greenman*, they have reached no consensus on the components of a strict products liability suit. Yet certain basic principles have emerged, and it may generally be said that in order to recover upon a theory of strict liability in tort, the plaintiff must establish

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71. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

72. CAL. CIV. CODE § 1769 (West 1973).

73. 59 Cal. 2d at 61, 377 P.2d at 900, 27 Cal. Rptr. at 700.

74. *Id.* at 62-63, 377 P.2d at 900-01, 27 Cal. Rptr. at 700-01.

75. *See* Prosser, *The Fall, supra* note 3, at 793-800.

76. RESTATEMENT (SECOND) OF TORTS § 402A (1965):
Special Liability of Seller of Product for Physical Harm to User or Consumer
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to this property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

that: (1) the defendant placed the product upon the market knowing that it would be used without inspection for defects; (2) the product as sold was defective[77] and unreasonably dangerous;[78] (3) the product is expected to and does reach the user without substantial change in the condition in which it is sold; and (4) the defective condition complained of was the proximate cause of injury to the plaintiff.[79] Thus, proper strict liability analysis focuses on the product itself as sold, and is not premised upon an assessment of the manufacturer's or seller's duty of care; indeed, strict liability is imposed although "the seller has exercised all possible care."[80]

Despite the christening of a strict tort liability cause of action in the *Greenman* case, the adoption of its rationale in many jurisdictions, and its subsequent recognition in section 402A of the Restatement (Second) of Torts, the Ohio courts balked at acceptance of the strict tort doctrine and refused to further erode privity requirements.[81] Absent privity, the consumer could proceed against a seller in a negligence suit only if the injury-causing product was inherently dangerous or had become imminently so at the time it left the seller's hands because of his negligence. An action based upon an express warranty sounding in tort pursuant to the *Rogers* case obviated the necessity of making a showing of privity where the plaintiff could show that the damage resulted from reliance upon representations made by the seller in the course of expressly warranting its product.[82] But Ohio retained the rule that recovery upon an implied warranty claim required a showing by the injured party that he was in privity with the party subjected to the implied warranty,[83] except to the extent that the Uniform Commercial Code broadened warranty

77. It may generally be said that a product is "defective" if it is not reasonably fit for the ordinary purposes for which such a product is used and sold, or that it is unsafe for the purpose intended. *See* Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969); Stammer v. General Motors Corp., 123 Ill. App. 2d 316, 259 N.E.2d 352 (1970); Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 470 P.2d 135 (1970); Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). *See also* RESTATEMENT (SECOND) OF TORTS § 402A, Comments g & h (1965). There has been, however, no concrete and final exposition of what constitutes a "defect" for strict liability purposes; rather, the definition of the term has largely been dealt with on a case-by-case basis. *See* Traynor, *supra* note 5.

78. The Restatement (Second) of Torts defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." For example, ordinary whiskey is not "unreasonably dangerous" because it makes one drunk, but whiskey contaminated with fuel oil will undoubtedly be unreasonably dangerous. RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965).

79. 1 R. HURSH & H. BAILEY, *supra* note 8, § 4:10.

80. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965).

81. Yount v. Positive Safety Mfg. Co., 319 F.2d 324 (6th Cir. 1963); Tomle v. New York Cent. R. R., 234 F. Supp. 101 (N.D. Ohio 1964); Miller v. Chrysler Corp., 90 Ohio L. Abs. 317, 183 N.E.2d 421 (Ohio Ct. App. Cuyahoga County 1962).

82. Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958); Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).

83. Miller v. Chrysler Motor Corp., 90 Ohio L. Abs. 317, 183 N.E.2d 421 (Ohio Ct. App. Cuyahoga County 1962); Kennedy v. General Beauty Prods., Inc., 112 Ohio App. 505, 167 N.E.2d 116 (1960).

protection.[84] Ohio law stood in this uncertain posture when the Supreme Court of Ohio handed down its next major opinion in the products liability area.

B. Lonzrick *and the "Implied Warranty in Tort" Cause of Action in Ohio*

With its opinion in *Lonzrick v. Republic Steel Corp.*,[85] the Supreme Court of Ohio clarified some of the confusion about the requirement of privity in products liability suits. For the first time, Ohio law recognized that a manufacturer of goods could be liable in negligence for injury-causing shortcomings in its products without a showing of privity between plaintiff and manufacturer. Furthermore, the court repudiated its previous holdings, and allowed a subcontractor's employee, injured by steel roof joists falling from overhead, to proceed on a theory of "implied warranty in tort" directly against the manufacturer of the joists, which had been sold to the general contractor. Divorced from traditional modes of products liability recovery in negligence and warranty, an "implied warranty in tort" could be the basis for imposition of liability upon a manufacturer who sells a defective product that proximately causes injury to a person whose presence the manufacturer could reasonably anticipate, despite the complete absence of privity between the manufacturer and the injured party.

The *Lonzrick* court found it unjust to confine the protection of the consumer to only those situations in which the manufacturer has expressly warranted its product through media advertisements and the injured user has relied upon those representations in purchasing the product, as in *Rogers v. Toni Home Permanent Co.* While acknowledging the soundness of allowing the purchaser to recover when he has been injured because the product failed to reflect the representations of quality that had induced the purchaser to buy the product in the first instance, the court rejected the proposition that the user's failure to rely upon such an express affirmation of product quality should bar recovery. The court posited these elements as necessary for the successful assertion of an implied warranty in tort claim: (1) that a defect existed in the product manufactured and sold by the defendant; (2) that the defect existed in the product at the time of sale; (3) that at the time of injury the goods were being used for their ordinary intended purpose; (4) that the defect was the direct and proximate cause of the plaintiff's injury; and (5) that at the time of injury the plaintiff was in a place which the defendant could reasonably anticipate.[86] Subsequent decisions of the court recognized that the implied warranty in tort action

84. *See* notes 37-41 and accompanying text *supra*. *See also* Jenkins, *The Product Liability of Manufacturers: An Understanding and Exploration*, 4 AKRON L. REV. 135, 142 n.27 (1971).

85. 6 Ohio St. 2d 227, 218 N.E. 2d 185 (1966).

86. *Id.* at 237, 218 N.E.2d at 192-93.

could permit recovery even if the manufacturer exercised all possible care, and that the claimant could recover without showing negligence or a lack of reasonable care on the part of the defendant.[87] In defining what a "defect" is, the court relied heavily upon the concept of a warranty of merchantability under the Uniform Commercial Code,[88] asserting a product is to be considered defective when it is not "of good and merchantable quality and safe for . . . [its] ordinary intended use."[89]

Thus, the Ohio courts eroded privity requirements in suits against manufacturers by consumers injured by unsafe products. Important strides had been taken by the *Lonzrick* court in meeting some of the privity-related deficiencies of existing modes of recovery, but subsequent readings of *Lonzrick* suggested curious discrepancies between Ohio's "implied warranty in tort" action and prevailing strict products liability doctrine.

C. *"Implied Warranty in Tort" vs. Strict Products Liability Under Section 402A of the Restatement (Second) of Torts*

Although the *Lonzrick* case has often been construed as the origin of the strict products liability action in Ohio,[90] it is significant to note that the Supreme Court did not so designate this new cause of action, despite the recognition of the court of appeals that this new theory should be termed strict tort liability and that the use of the term "warranty" was improper.[91] Nor did the court adopt section 402A of the Restatement (Second) of Torts as its standard in strict products liability suits, although the *Lonzrick* and Restatement theories share several similar elements.[92] These omissions may be viewed merely as an oversight, but the decisions in Ohio show that there may exist important practical differences between these theories of recovery.

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87. Gast v. Sears, Roebuck & Co., 39 Ohio St. 2d 29, 31, 313 N.E.2d 831, 833 (1974).

88. OHIO REV. CODE ANN. § 1302.27(B) (Page 1962); U.C.C. § 2-314(2) (1972) provides: "(B) Goods to be merchantable must be at least such as . . . (3) are fit for the ordinary purposes for which such goods are used . . . ."

89. 6 Ohio St. 2d 227, 231, 218 N.E.2d 185, 188-89 (1974).

90. Gast v. Sears, Roebuck & Co., 39 Ohio St. 2d 29, 313 N.E.2d 831 (1974); State Auto. Mut. Ins. Co. v. Chrysler Corp., 36 Ohio St. 2d 151, 304 N.E.2d 891 (1973). Groves v. Phillips Petroleum Co., 22 Ohio App. 2d 25, 257 N.E.2d 759 (Summit County 1969); Jenkins, *supra* note 84, at 161; Prosser, *The Fall, supra* note 3, at 795; Note, *supra* note 12, at 554-56; *Recent Developments*, 28 OHIO ST. L.J. 159 (1967).

91. Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 384, 205 N.E.2d 92, 99 (Cuyahoga County 1965).

92. As outlined in Jenkins, *supra* note 84, at 161:

> The other elements of section 402A are similar to the elements of the implied warranty theory described in *Lonzrick*. The common aspects are (1) all products are encompassed, (2) the product must be defective, (3) the defect must have existed at the time the product left the control of the defendant, (4) the product must have been being used as intended, (5) the defect must have proximately caused the injury, (6) liability may result although all possible care has been exercised in the preparation and sale of the product, and (7) privity of contract need not be present.

1. *Potential Defendants*

The *Lonzrick* theory of recovery and strict products liability under Restatement (Second) of Torts Section 402A differ with respect to the parties that could potentially be held liable. The *Lonzrick* opinion fashions rules applicable to a party repeatedly called a "manufacturer-seller," and subsequent decisions have dealt with implied warranty in tort claims asserted exclusively against nonprivy sellers who are manufacturers.[93] The *Lonzrick* opinion does not authorize an implied warranty in tort suit against other nonprivy sellers, and Ohio law has not yet extended the theory that far. The Restatement imposes strict liability upon "[o]ne who sells any product in a defective condition unreasonably dangerous . . . ," and the comments make it clear that liability can be extended to manufacturer, wholesaler, retailer, and distributor alike.[94] It seems certain that recovery against other nonprivy sellers in Ohio, however, could be had pursuant only to theories of negligence and contractual warranty.

Language in *Lonzrick* and subsequent Ohio decisions suggests a more fundamental difference between implied warranty in tort recovery in Ohio and strict liability theory. The *Lonzrick* opinion decried the denial of recovery against manufacturers of unsafe products on the basis of "outmoded and irrelevant concepts of privity."[95] Curiously enough, the opinion makes no mention of the notice, disclaimer, and limitation of liability sections of the Uniform Commercial Code,[96] which had also frustrated attempts at redress of the injuries caused by defective products. It has been suggested that the *Lonzrick* decision was addressed only to the privity problem in products liability cases, and that the implied warranty in tort remedy could be utilized by an injured user of a chattel only in an action against a party with whom he was *not* in privity. To seek recovery from a party with whom the injured party *was* in privity, the plaintiff could look only to the substance of his contract and the provisions of Ohio's version of the Uniform Commercial Code.[97] A strict products liability claim under section 402A of the Restatement (Second) of Torts, however, is simply another theory of recovery available against any seller, regardless of privity.[98] In an appropriate situation, claims under contractual warranty theory and under strict products liability theory could be joined

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93. *See* Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975); State Auto. Mut. Ins. Co. v. Chrysler Corp., 36 Ohio St. 2d 151, 304 N.E.2d 891 (1973); United States Fidelity & Guar. Co. v. Truck & Concrete Equip. Co., 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970); Avenell v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 324 N.E.2d 583 (Cuyahoga County 1974); Burkhard v. Short, 28 Ohio App. 2d 141, 275 N.E.2d 632 (Williams County 1971).

94. RESTATEMENT (SECOND) OF TORTS § 402A (1) & Comment f (1965).

95. 6 Ohio St. 2d at 234, 218 N.E.2d at 190.

96. *See* notes 20-31 and accompanying text *supra*.

97. *See* Note, *Recovery of Direct Economic Loss: The Unanswered Questions of Ohio Products Liability Law*, 27 CASE W. RES. L. REV. 683, 709-17 (1977).

98. RESTATEMENT (SECOND) OF TORTS § 402A, Comments f & m (1965).

against a seller with whom the injured party was in privity; the two are not to be regarded as mutually exclusive alternatives, the former to be pressed if privity is present, the latter if privity is absent, as seems to be possible in Ohio.

The holding of the Court of Appeals of Cuyahoga County in *Avenell v. Westinghouse Electric Corp.*[99] substantiates the view that *Lonzrick* prescribes parallel but exclusive theories. The insurance subrogees of an electric utility company sought recovery from the manufacturer of an allegedly defective generator, with whom the utility company was in privity, for economic losses resulting from the breakdown caused by the generator, namely loss of sales during the breakdown and costs incurred in providing electricity during that period. Claims made by the plaintiff based upon the contract between the utility company and the defendant were deemed futile by the court, since the defendant had effectively disclaimed any implied warranties pursuant to section 2-316(2) of the Uniform Commercial Code,[100] and had also effectively excluded liability for consequential damages under section 2-719(3)[101] of the Code.[102] The court then refused recovery upon an implied warranty in tort, cautioning that the doctrine of implied warranty in tort should not displace provisions of the Uniform Commercial Code, which permitted buyers and sellers to negotiate and settle by contract their rights and remedies in regard to liability for defective products. The court held that when two sophisticated buyers dealing at arm's length agree to an exclusion of liability for consequential damages, those damages should not be recoverable upon an implied warranty in tort claim, because "[i]mplied warranty in tort is ordinarily applied where the purchaser *is not* in privity with the seller."[103] The manufacturer-seller of a product was in essence allowed to disclaim liability under a theory of implied warranty in tort, while the manufacturer-seller clearly has no such power to disclaim strict liability in tort.[104] Whatever its subsequent application, *Avenell* illustrates Ohio's bifurcated approach, which makes privity the initial determinant of products liability theories available to the plaintiff.

2. *Recoverable Damages*

A final difference between implied warranty in tort recovery and prevailing strict products liability theory turns upon the types of damages potentially recoverable. The damages recoverable in a products liability suit can be grouped into three broad categories. The use of a defective

99. 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).

100. OHIO REV. CODE ANN. § 1302.29 (Page 1962).

101. *Id.* § 1302.93.

102. 41 Ohio App. 2d at 152-56, 324 N.E.2d at 585-87.

103. *Id.* at 158, 324 N.E.2d at 589.

104. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965).

product may result in damages for personal injuries[105] or "property damage," which connotes the physical injury to an object, resulting from damage caused by the product.[106] A third possible component of damages in a products liability case is "economic loss," which represents a pecuniary loss suffered by a consumer. Economic loss refers to diminished value of the product as a result of its defectiveness ("direct" economic loss), and further loss caused by that loss of product value, such as lost profits or loss of goodwill ("indirect" economic loss).[107] "Direct" economic loss is measurable as the difference between the value of the defective product and the value it would have had if not defective.[108]

Traditionally, the rule has been that an injured party could recover in tort negligence suits for personal injury and property damage, but not for purely economic losses,[109] which would be recoverable only in a suit upon a contract against a party with whom he was in privity to recover the benefit of his bargain[110] and reasonably foreseeable consequential damages,[111] which correspond to the "direct" and "indirect" economic losses described above. Problems arise, however, in determining whether physical damage to the defective chattel itself is "property damage" recoverable in a tort suit or an "economic loss" recoverable only in a suit on the contract or under the Uniform Commercial Code warranty provisions. American courts have been willing to regard damage to a chattel as a result of a defect in the chattel introduced by the manufacturer's negligence as "property damage" recoverable in a negligence suit against the manufacturer, when the damage is caused by a violent, dramatic accident.[112] The injury is, however, characterized as "economic loss" when the damage is merely a noncatastrophic deterioration of the product because of the defect; for such a loss the buyer must look to his contractual remedies. If an automobile catches fire and is destroyed because of the manufacturer's

105. The potentially recoverable damages for personal injuries include: (1) medical expenses; (2) pain, suffering, and embarassment; (3) lost earnings; and (4) permanent impairment of earning capacity.

106. *See* Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability*, 27 CASE W. RES. L. REV. 647, 651 (1977). *See also* Zammit, *Manufacturers' Responsibility for Economic Loss Damages in Products Liability Cases: What Result in New York?*, 20 N.Y.L.F. 81, 82 (1974).

107. *See* Edmeades, *supra* note 106, at 651. *See also* Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966).

108. *See* Note, *Recovery of Direct Economic Loss: The Unanswered Questions of Ohio Products Liability Law*, 27 CASE W. RES. L. REV. 683 (1977). *See generally* Comment, *The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 SETON HALL L. REV. 145 (1972); Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539 (1966).

109. *See, e.g.*, Fentress v. Van Etta Motors, 157 Cal. App. 2d 863, 323 P.2d 227 (1958); Wyatt v. Cadillac Motor Car Div., 145 Cal. App. 2d 423, 302 P.2d 665 (1956); Amodeo v. Autocraft Hudson, Inc., 195 N.Y.S.2d 711 (1959), *aff'd*, 12 App. Div. 2d 499, 207 N.Y.S.2d 101 (1960). *See also* W. PROSSER, *supra* note 7, § 101, at 665-67.

110. *See, e.g.*, Boylston Hous. Corp. v. O'Toole, 321 Mass. 538, 74 N.E.2d 288 (1947).

111. Hadley v. Baxendale, 156 Eng. Rep. 145 (Exch. Ch. 1854).

112. *See* Fentress v. Van Etta Motors, 157 Cal. App. 2d 863, 323 P.2d 227 (1958).

negligence in designing the electrical system, the loss is "property damage"; premature rusting of an automobile because of a defect in the painting process is mere "economic loss."

Although contemporary products liability doctrine permits a manufacturer to be held liable for personal injury and property damage resulting from its negligence in production and marketing, regardless of privity,[114] recovery for economic losses unaccompanied by personal injury or property damage cannot be had in tort in a negligence suit. This rule was recognized by the Supreme Court of Ohio in *Inglis v. American Motors Corp.*[115]

In *Seely v. White Motor Co.*,[116] the California Supreme Court, in an opinion written by Chief Justice Traynor,[117] refused to allow recovery under a theory of strict products liability for economic losses sustained when plaintiff purchased a defective truck. The court instead premised recovery for the purchase price paid and for lost profits upon the express warranty made by the manufacturer of the truck. Traynor pointed out that strict liability theory had developed primarily to displace the inadequacies of sales law in protecting consumers from *physical* injury. The Uniform Commercial Code was designed to adjust the rights of parties when economic loss arises in a commercial transaction. When the product fails to meet contract specifications ("direct" economic loss) and its deficiencies cause loss of profits ("indirect" economic loss), the Uniform Commercial Code is wholly adequate to meet the needs of parties to commercial transactions.[118] Moreover, if strict liability in tort were held to lie for economic losses, the parties would not be free to bargain for the standard of quality to be observed by the manufacturer; strict liability standards would pre-empt such an agreement, and subject the manufacturer to damages of "unknown and unlimited scope,"[119] in spite of the agreement of the parties. Because disclaimer of strict tort liability is not possible, the parties would be deprived of an opportunity to adjust commercial losses as they wished pursuant to the Code.[120]

The *Seely* Court also recognized that the policy rationale of strict products liability[121] does not compel that the manufacturer be held strictly liable for commercial losses visited upon the consumer because of a

113. *See* Edmeades, *supra* note 106, at 651-52.

114. *See* note 109 and accompanying text *supra*.

115. 3 Ohio St. 2d 132, 140-41, 209 N.E.2d 583, 588 (1965).

116. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

117. It is significant that Chief Justice Traynor wrote this opinion, since he was the earliest advocate of the strict liability cause of action and a leading proponent in its adoption. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).

118. 63 Cal. 2d at 16, 403 P.2d at 150, 45 Cal. Rptr. at 22.

119. *Id.* at 17, 403 P.2d at 150-51, 45 Cal. Rptr. at 22-23.

120. *Id.* at 16, 403 P.2d at 150, 45 Cal. Rptr. at 22. *See* U.C.C. § 2-316 (1972).

121. *See* note 5 and accompanying text *supra*.

defective product. Although strict tort liability is founded upon a concern to prevent human suffering from defective products, the court pointed out that economic loss is not so devastating as physical impairment.[122] Furthermore, whatever policy justification there may be for distributing the risk of physical injury attendant to the use of a product among all users in the form of higher prices, there is little justification for redistributing the risk of one consumer's unfulfilled contractual expectations among other consumers.[123]

The *Seely* holding that economic losses should not be recoverable in a strict tort liability action appears to be the emerging rule in most states.[124] The Restatement (Second) of Torts section 402A provides that strict liability will attach for "*physical* harm thereby caused to the ultimate user or consumer, or to his property,"[125] and makes no mention of economic loss.

It is clear that recovery of economic losses can be had by a wronged buyer by means of a suit based upon the contract against any seller with whom he is in privity.[126] Such a suit would be governed in most states by the Uniform Commercial Code, which, in addition to any express warranties made by a seller, implies certain warranties[127] in any sale made by a merchant.[128] Unless these warranties are effectively excluded or modified[129] or the available remedies are limited or modified,[130] the buyer can recover as damages for breach of an express or implied warranty the difference in value of the goods accepted and the value they would have had if they had been as warranted,[131] and so recoup any direct economic loss. Indirect economic loss may be recovered as an incidental or consequential damage under the Code.[132] Recovery for economic losses has also been allowed in the absence of privity pursuant to the Code warranty provisions, when the manufacturer of goods has made an express

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122. 63 Cal. 2d at 18-19, 403 P.2d at 151, 45 Cal. Rptr. at 23.

123. *Id.* at 19, 403 P.2d at 151, 45 Cal. Rptr. at 23.

124. *See* Fredonia Broadcasting Corp. v. RCA Corp., 481 F.2d 781 (5th Cir. 1973); Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co., 360 F. Supp. 25 (S.D. Iowa 1973); Noel Transfer & Package Delivery Serv., Inc. v. General Motors Corp., 341 F. Supp. 968 (D. Minn. 1972); Miehle Co. v. Smith-Brooks Printing Co., 303 F. Supp. 501 (D. Colo. 1969); Beauchamp v. Wilson, 21 Ariz. App. 14, 515 P.2d 41 (1973); Price v. Gatlin, 241 Or. 315, 405 P.2d 502 (1965); Eli Lilly & Co. v. Casey, 472 S.W.2d 598 (Tex. Civ. App. 1971). *See also* Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 232 (1966); Note, *Negligent Interference with Economic Expectancy: The Case for Recovery*, 16 STAN. L. REV. 664, 685-88 (1964). *But see* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Edmeades, *supra* note 106, at 651.

125. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965) (emphasis added).

126. *See* note 110 *supra*.

127. *See* U.C.C. §§ 2-314, 2-315 (1972).

128. Defined *id.* § 2-104(1).

129. *See id.* § 2-316.

130. *See id.* § 2-719.

131. *See id.* § 2-714 (2).

132. *See id.* § 2-715.

warranty that has been brought to the attention of the buyer who purchases from a middleman-dealer.[133]

Although the Ohio courts at one point conformed to the majority rule and refused recovery of economic losses upon a theory of implied warranty in tort,[134] the Supreme Court of Ohio's decision in *Iacono v. Anderson Concrete Corp.*[135] allowed recovery for direct economic losses upon a theory of implied warranty in tort, suggesting a discrepancy between strict tort liability and the hybrid *Lonzrick* doctrine. Affirming a judgment in favor of plaintiff homeowner against the manufacturer of concrete used by a contractor in installing a driveway, the court purported to redress "property damage,"[136] but the loss to the plaintiff was purely economic. Due to defects in the concrete, the driveway developed small holes and was generally deteriorating when the first freeze occurred some five months after installation.[137] There was no accident or catastrophic occurrence resulting in sudden damage to the driveway, and so the damage was direct economic loss. Nevertheless, the court used a tort theory to redress economic losses that would not be recoverable under prevailing strict products liability law.[138] In light of the court's questionable characterization of the loss as "property damage,"[139] however, it is debatable whether the court deliberately caused Ohio's doctrine of "implied warranty in tort" to depart from prevailing strict tort liability law with respect to recovery for economic losses.

Lonzrick resolved some issues concerning products liability, but raised other issues. Clearly, the injured product user was relieved of the burdensome requirement of showing privity as a prerequisite to recovery in negligence against the manufacturer of that product. Perhaps more importantly, however, the *Rogers* warranty in tort suit, contingent upon the making of express representations by the defendant, had been superseded by a new "implied warranty in tort" cause of action, which subsequently developed into a species of strict products liability that was both more and less consumer-protective than the predominant American variety.

The implied warranty in tort action bestowed on consumers a new

133. *See, e.g.*, Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (automobile); Rhodes Pharmacal Co. v. Continental Can Co., 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966) (aerosol can); Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965) (automobile).

134. Avenell v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 324 N.E.2d 583 (Cuyahoga County 1974).

135. 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).

136. *Id.* at 92-93, 326 N.E.2d at 270-71.

138. *See* note 124 and accompanying text *supra*.

139. It should be noted that the *Iacono* court cited with approval *Inglis v. American Motors Corp.*, 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965). The *Inglis* decision had previously held that recovery in a tort suit based upon negligence for economic losses was not possible, yet allowed recovery of direct economic losses upon an express warranty made by the remote manufacturer, despite the absence of privity between the manufacturer and the injured buyer. Reliance on *Inglis* for recovery of economic losses in tort seems misplaced, although the rationale of *Inglis* is unclear.

products liability theory that more easily admitted of proof, because it did not saddle plaintiffs with the troublesome burden of proving privity with and a lack of reasonable care on the part of the manufacturer. Subsequent interpretations of *Lonzrick* suggested that the implied warranty in tort cause of action allowed the consumer recovery of "economic losses" attributable to defective products, which are not recoverable under prevailing strict products liability doctrine.

In two respects, however, Ohio's implied warranty in tort suit was developing into a more confining theory than strict products liability. First, among a chain of sellers who distributed the product for profit, the manufacturer alone appeared to be a proper defendant in an implied warranty in tort suit in Ohio. Second, privity remained a criterion for the new cause of action, but assumed a nontraditional function: The *presence* of privity between plaintiff and the defendant became a basis for dismissal of the implied warranty in tort claim.

The ambiguities in Ohio law began to surface in the wake of *Rogers* and became still more conspicuous following *Lonzrick*. *Temple v. Wean United, Inc.*[140] represents the latest attempt by the Supreme Court of Ohio to clarify Ohio products liability law.

III. THE *Temple* OPINION

A. *The Facts*

The Supreme Court of Ohio's decision in *Temple v. Wean United, Inc.*[141] had its genesis in 1972. Plaintiff Beverly Temple was operating a seventy-five ton power press at her place of employment when aluminum extractions fell from the bolster plate in front of her onto the dual operating buttons located at waist level, causing the press to close on her arms. Both of plaintiff's hands and forearms were crushed and required amputation.[142]

The new press had been sold by Wean United in 1954 to General Motors Corporation, and subsequently passed through an intermediary to the plaintiff's employer, Superior Metal Products, Inc.[143] The starter buttons had been placed by the manufacturer at shoulder level, but plaintiff's employer had repositioned them at waist level, facing up.[144] The plaintiff brought suit against General Motors, the manufacturer of the starter buttons, and Wean United on theories of negligence, implied warranty, and strict liability in tort.[145] The supreme court

140. 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).
141. *Id.*
142. *Id.* at 318, 364 N.E.2d at 269.
143. *Id.*
144. *Id.* at 318-19, 364 N.E.2d at 269.
145. *Id.* at 320, 364 N.E.2d at 270.

unanimously affirmed summary judgments entered in favor of the defendants.[146]

B. *The Holdings*

By a four to three majority,[147] the court brought Ohio into the ranks of American jurisdictions that have adopted Restatement (Second) of Torts section 402A as the standard of strict products liability.[148] This holding may resolve considerably the ambiguity in Ohio's "implied warranty in tort" law. The previous refusal of the Supreme Court of Ohio to adopt the strict liability in tort label suggested that the court perceived important substantive differences between the two theories. In a more substantive sense, the adoption of section 402A should serve to establish that nonmanufacturing middlemen, that is, retailers, wholesalers, and distributors, may be subjected to a stricter form of liability than negligence.[149] The court's approval of the "numerous illustrative comments"[150] to section 402A suggests that Ohio courts should abide by those comments,[151] and extend the scope of strict tort liability to original manufacturers and middlemen alike.[152] Such strict tort liability would be

146. *Id.* at 328-29, 364 N.E.2d at 274.

147. Three justices, including the late Chief Justice O'Neill, the author of the opinion in *Lonzrick*, refused to join in paragraphs one and two of the syllabus, which quote nearly verbatim § 402A. In a concurring opinion, Chief Justice O'Neill contended that the approval of § 402A was unnecessary to the decision of the case. 50 Ohio St. 2d at 328-29, 364 N.E.2d at 274 (O'Neill, C.J., concurring). Given the court's determinations that the press sold by Wean United and General Motors was not defective in any way and that the alteration by plaintiff's employer was the "sole, responsible cause" of the accident, 50 Ohio St. 2d at 323, 364 N.E.2d at 271, the Chief Justice was probably correct in his implicit assumption that the defendants would not be liable under either Ohio's "implied warranty in tort" or strict liability. Thus, it may well have been unnecessary to the decision to adopt § 402A strict liability as Ohio's standard of liability.

Presumably, the Chief Justice doubted the validity of the majority's assertion that Ohio's version of "implied warranty in tort" and strict tort liability under § 402A are "virtually indistinguishable," 50 Ohio St. 2d at 320, 364 N.E.2d at 270, a doubt that this Note suggests is reasonable. No decision, however, has positively established any substantive differences between the two theories. The confusing discrepancies have arisen from the reluctance of the courts to expand the reach of the "implied warranty in tort" doctrine beyond the facts of the individual case and extend the potential for recovery as far as strict products liability might allow. The Chief Justice may technically have been correct, but from a policy standpoint the majority seems to have made a valuable contribution to Ohio products liability law by adopting a more certain standard of liability, upon which business decisions can be based.

148. *See* the cases collected at 50 Ohio St. 2d at 322 n.3, 364 N.E.2d at 271 n.3.

149. *See* notes 93-104 and accompanying text *supra*.

150. 50 Ohio St. 2d at 322, 364 N.E.2d at 271.

151. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment f (1965).

152. The extension of strict tort liability to wholesalers, distributors, and retailers is supported by the same policy justifications that bolster the imposition of strict liability in tort upon the original manufacturer. These middlemen, like the manufacturer, are engaged in the business of producing and marketing goods, and, as an integral part of this commercial enterprise, should bear the cost of injuries resulting from defective products. The retailer may be the only party available to the injured plaintiff, and may play a substantial role in assuring product safety or may be able to exert pressure upon the manufacturer to do so. Moreover, no undue burden is imposed upon these middlemen, who can distribute the costs of protecting against these risks among themselves, the manufacturer, and the purchaser. *See* cases cited at Annot., 13 A.L.R.3d 1057, § 10[c] & [d] (1967). *See also* 63 AM. JUR. 2D *Products Liability* §§ 148, 149 (1972). It should be noted that the cases have not settled the question whether strict liability recovery will be permitted against a retailer of a product that has been sealed

imposed regardless of privity, and dicta, such as that in *Avenell v. Westinghouse Electric Corp.*,[153] indicating that an injured plaintiff could not look to a stricter form of liability than negligence in a suit against a party with whom he was in privity would be superseded.[154] Although the emerging view appears to be that economic losses are not recoverable in a strict products liability action in the absence of personal injury,[155] some courts have reached contrary results on this issue;[156] it is thus debatable whether the Supreme Court of Ohio's decision in *Iacono v. Anderson Concrete Corp.*[157] allowing recovery upon a theory of implied warranty in tort of what were actually economic losses under the name "property damage" will continue to be good law.[158] Section 402A of the Restatement (Second) of Torts makes it clear that strict products liability claims do not present some of the difficulties associated with other products liability theories that have reduced their utility to the consumer. The Restatement specifically recognizes that the contributory negligence of a plaintiff does not bar his strict products liability action,[159] and the courts have largely so held.[160] Under strict products liability doctrine, there is no duty to notify the seller of the alleged defect, the breach of which would bar the plaintiff from recovery.[161] Nor can a seller disclaim strict products liability, because that liability is founded upon the existence of a defective product and not upon the representations made or disclaimed in the bargaining process.[162]

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before reaching the retailer and is resold in that condition. Comment f to § 402A would seem to authorize such a recovery as long as the retailer was in the business of selling such products, but the courts have been reluctant to impose strict liability in this situation. *See, e.g.*, McLeod v. W.S. Merrell Co., 174 So. 2d 736 (Fla. 1965).

153. 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974). *See* notes 93-104 and accompanying text *supra*.

154. *See* cases cited at note 152 *supra*.

155. *See, e.g.*, Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). *See also* notes 105-33 and accompanying text *supra*.

156. *See, e.g.*, Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

157. 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).

158. *See* notes 134-39 and accompanying text *supra*.

159. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). That Comment does recognize, however, that a plaintiff is barred from recovery when he discovers a defect and knows of the danger presented, yet voluntarily and unreasonably proceeds to encounter such known danger by using the product. This defense is commonly known as an assumption of the risk. *See* W. PROSSER, *supra* note 7, § 68, at 440. Also, some jurisdictions have injected comparative negligence principles into strict products liability cases by considering the plaintiff's own lack of reasonable care in assessing recoverable damages in strict products liability suits, although that lack of care will not bar the plaintiff's action. *See* Comment, *Comparative Negligence and Strict Products Liability:* Butaud v. Suburban Marine & Sporting Goods, Inc., 38 OHIO ST. L.J. 883 (1977).

160. The courts generally agree that contributory negligence in the sense of a failure to discover or guard against product defects is not a defense to an action based upon strict products liability in tort. *See* cases collected in Annot., 46 A.L.R.3d 240 § 4[b] (1972). Other courts have taken a broader view and held that the plaintiff's negligence in failing to exercise ordinary reasonable care for his own safety is not a bar to a strict products liability action. *See* cases collected in Annot., 46 A.L.R.3d 240 § 4[a] (1972).

161. RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965).

162. *See, e.g.*, Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146 (3rd Cir. 1974); Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709 (10th Cir. 1974); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Vandermark v. Ford Motor Co., 61 Cal.2d 256, 391 P.2d 168, 37

The *Temple* opinion is also significant for the limitations it imposes on the liability of the manufacturer and subsequent vendees. The courts have recognized that strict liability does not require a manufacturer or seller of a product to insure that no injury will result from the use of the product.[163] Thus, the plaintiff must bear the burden of persuasion in showing that the product was defective and unreasonably dangerous when it left the seller's hands,[164] that the defective product was the proximate cause of injuries to himself,[165] and that the product reached the plaintiff without substantial change in its condition.[166] The term "substantial change" is one laden with uncertainty. It is difficult to determine in a given case whether alteration of a product after its placement in the stream of commerce can operate to cut off the liability of a prior manufacturer or seller.[167] The court absolved Wean United and General Motors as a matter of law of strict products liability on the ground that there was no defect in the product as originally manufactured and then sold by Wean United and General Motors and that the alteration of the machine by the plaintiff's employer was the "sole responsible cause" of the accident.[168] The court aptly resolved the situation in which it is most apparent that a manufacturer or seller should not be held strictly liable in tort: when the accident would not have occurred had the machine remained in the condition in which it was sold and the alterations by a subsequent user were the sole cause of the accident. In such a situation, the plaintiff has failed to allege or produce evidence of facts sufficient to show two necessary elements of the plaintiff's strict products liability case, namely, that there was a defect in the product at the time it was placed in the stream of commerce by the seller and that the product reached the plaintiff without substantial change in the condition in which it was sold.[169] Given such a clear set of facts, the supreme court was

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Cal. Rptr. 896 (1964); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Browne v. Fenestra, Inc., 375 Mich. 566, 134 N.W.2d 730 (1965); Velez v. Craine & Clark Lumber Corp., 33 N.Y.2d 117, 305 N.E.2d 750 350 N.Y.S.2d 617 (1973). *See also* RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965).

163. Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Shramek v. General Motors Corp., 69 Ill. App. 2d 72, 216 N.E.2d 244 (1966); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

164. *See* cases cited at 63 AM. JUR. 2D *Products Liability* § 129 (1972).

165. *See* cases cited at 63 AM. JUR. 2D *Products Liability* § 135 (1972).

166. Dennis v. Ford Motor Co., 471 F.2d 733 (3d Cir. 1973); Southwire v. Beloit E. Corp., 370 F. Supp. 842 (E.D. Pa. 1974); O.S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968); Bradford v. Bendix-Westinghouse Auto. Air Brake Co., 33 Colo. App. 99, 517 P.2d 406 (1973); Rossignal v. Danbury School of Aero., Inc., 154 Conn. 549, 227 A.2d 418 (1967); Cornette v. Sarjeant Metal Prod. Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970).

167. *See* Comment, *Substantial Change: Alteration of a Product as a Bar to a Manufacturer's Strict Liability*, 80 DICK. L. REV. 245 (1975).

168. 50 Ohio St. 2d at 323, 364 N.E.2d at 271.

169. For a sampling of cases in which the manufacturer or seller was so clearly free of liability, and in which the decision was often reached by summary judgment or directed verdict, see Hanlon v. Cyril Bath Co., 541 F.2d 343 (3d Cir. 1975); Hardy v. Hull Corp., 446 F.2d 34 (9th Cir. 1971); Southwire v. Beloit E. Corp., 370 F. Supp. 842 (E.D. Pa. 1974); Martinez v. Nichols Conv'r & Eng'r,

able to expressly adopt the consumer-protective strict products liability cause of action, simultaneously resolving problems associated with its "implied warranty in tort" doctrine and marking definitively a line beyond which the manufacturer can rest assured that strict products liability will not reach. Undoubtedly, more difficulties for the Ohio courts will arise in defining the boundaries of potential liability of the manufacturer in strict tort for injury-causing products that are altered in some fashion after sale.[170]

IV. SHADES OF NEGLIGENCE IN OHIO'S STRICT PRODUCTS LIABILITY ACTION

Despite its salutary effects, *Temple* contains elements that portend troublesome confusion in sorting out the various theories of products liability recovery. *Temple* can plausibly be read to suggest divergent standards of strict products liability in scrutinizing possible manufacturing, as opposed to design, defects, subjecting the latter to a more lenient negligence-based standard. In part II of the opinion, the court held that the alterations made by Mrs. Temple's employer were the "sole responsible cause" of the accident, which, as a matter of law, absolved the original manufacturer of strict tort liability.[171] As recovery in strict tort liability demands a showing that the defendant's actions have been the proximate cause of injury to the plaintiff,[172] the court correctly found that when such subsequent alteration breaks the chain of causation between the defendant's acts and the plaintiff's injuries, liability cannot be ascribed to the original manufacturer.[173] By the same token, it is clearly the Ohio rule that when an original manufacturer places a product upon the market and a subsequent alteration of that product is the sole and proximate cause of injury to a user, any liability on the part of the original manufacturer for negligence is cut off.[174] In light of the court's holding that alterations to

243 Cal. App. 2d 795, 52 Cal. Rptr. 842 (1966); Cornette v. Searjeant Metal Prods., 147 Ind. App. 46, 258 N.E.2d 652 (1970).

170. It is beyond the scope of this Note to discuss the difficulties inherent in determining whether subsequent alteration of a product amounts to "substantial change" that frees a prior manufacturer or seller of strict tort liability. The term "substantial change" is a term of art for the legal conclusion that the alteration should be regarded as the proximate cause of an injury. Thus, a failure to prove that a product has reached the user without "substantial change" is a failure to prove that any defect in the product as sold by a particular defendant was the proximate cause of injury. As a consequence, the problems of alteration are often bound up with problems of causation, which inevitably complicate assessment of an original actor's potential liability when one or more acts have intervened between the actor and the injury. Problems of alteration have been termed "a hazy area in strict liability," but the determination whether substantial change has occurred in situations similar to that in *Temple* has been termed by the same author "rather simple." Comment, *supra* note 167, at 246, 249.

171. 50 Ohio St. 2d at 323, 364 N.E.2d at 271.

172. *See* note 79 and accompanying text *supra*.

173. *See* Annot., 41 A.L.R.3d 1251 (1972).

174. *See, e.g.*, Keet v. Service Mach. Co., 472 F.2d 138 (6th Cir. 1972); Brown v. General Motors Corp., 355 F.2d 814 (4th Cir. 1966); Krysiak v. Acme Wire Co., 169 F. Supp. 576 (N.D. Ohio 1959); Bennison v. Stillpass Transit Co., Inc., 5 Ohio St. 2d 122, 214 N.E.2d 213 (1966);

the punch press after it left the hands of Wean United were the "sole responsible cause" of the injuries to the plaintiff, absolving the original manufacturer of strict tort liability, it might be presumed that this breakdown in causation would likewise free Wean United of liability in negligence.

Nevertheless, in part III of the opinion, the court returned to the question of the design responsibility of the original manufacturer. It considered whether Wean United might be held liable for failing to incorporate in its product design a "fixed barrier guard," which might well have prevented the injuries to Mrs. Temple by precluding her from inserting her hands into the space between the die and the ram.[175] The court purported in part III to confine the discussion to only the allegation of negligence made against the original manufacturer, implying that the strict products liability issue was not under consideration. Examination of this discussion in the context of the opinion as a whole nevertheless reveals that the court necessarily assessed the potential liability of Wean United for its failure to include a fixed barrier guard under theories of negligence *and* strict tort liability. As suggested above, the court's finding that the alterations by plaintiff's employer were the sole cause of the accident would, in most instances, absolve the original manufacturer of liability in negligence. By refusing to summarily absolve the original manufacturer on the negligence count on the basis of superseding cause, the court, although it gave no hint of its rationale, must implicitly have confronted another aspect of the problem of superseding cause. Although a subsequent alteration of a product may be the direct cause of an injury, it is not necessarily the *superseding* cause of injury. Even when the alteration of the product is the direct cause of an injury, the original manufacturer may still be held liable in negligence, if the alteration was reasonably foreseeable and the original manufacturer failed to design the product so that it would remain safe after reasonably foreseeable alteration.[176] Strict products liability doctrine is no less demanding in this regard: An original manufacturer may similarly be held strictly liable in spite of subsequent alteration, if that alteration could be deemed foreseeable.[177]

Thus, the true inquiry in part III is whether the manufacturer's design responsibility extended to foreseeing subsequent alteration by plaintiff's employer and protecting against it by designing fixed barrier guards into its punch press, although the court purported to consider only whether

Hurt v. Charles J. Rogers Transp. Co., 164 Ohio St. 323, 130 N.E.2d 824 (1955). *See also* RESTATEMENT (SECOND) OF TORTS §§ 440 & 442 (1965).

175. 50 Ohio St. 2d at 325-27, 364 N.E.2d at 272-73.

176. *See* cases cited at note 174 *supra.*

177. *See, e.g.*, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Alvarez v. Felker Mfg. Co., 230 Cal. App. 2d 987, 41 Cal. Rptr. 514 (1964); Ford Motor Co. v. Russel & Smith Ford Co., 474 S.W.2d 549 (Tex. Civ. App. 1971); Sharp v. Chrysler Corp., 432 S.W.2d 131 (Tex. Civ. App. 1968).

Wean United was negligent in not including those guards. A manufacturer could be subjected to liability for product design on a theory either of negligence[178] or strict products liability.[179] After introducing the issue whether liability may attach because of the failure of Wean United to design a press with a fixed barrier guard, the court went on to state this proposition of law:

> To date, no Ohio case has specifically defined the duties of a manufacturer relative to product design, but the general rule is that ". . . [i]t is the duty of a manufacturer to use reasonable care under the circumstances to so design his product as to make it not accident or foolproof, but safe for the use for which it is intended."[180]

This "general rule" suggests the "reasonable man" standard of care ordinarily imposed under negligence theory.[181] The pronouncement of this "general rule" may simply reflect the court's confusing characterization of the issue in part III as involving solely the allegation of negligence. Yet the court's general rule of "reasonable care" in product design may indicate a more fundamental disposition of the court to subject manufacturers to a less demanding standard than strict products liability in the case of design, as opposed to manufacturing, defects in a product.[182] The court lays down this standard of "reasonable care" for product design in the face of its recognition in the syllabus of the opinion that strict products liability attaches though the defendant has exercised "all possible care."[183] Such a bifurcated approach to strict products liability standards for "design" and "manufacturing"[184] defects would be an unnecessary and unfortunate deviation in Ohio strict products liability law.

The courts have not advanced a consistent policy reason for differentiating between design defects and defects resulting from manufacture.[185]

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178. RESTATEMENT (SECOND) OF TORTS § 398 (1965).

179. *Id.* § 402A, Comments g & h.

180. 50 Ohio St. 2d at 326, 364 N.E.2d at 273 (*quoting* Gosset v. Chrysler Corp., 359 F.2d 84, 87 (6th Cir. 1966)).

181. *See* W. PROSSER, *supra* note 7, § 32, at 150.

182. Although such a departure would be radical, it would not be unprecedented. The Kentucky Court of Appeals in Jones v. Hutchison *Mfg. Inc.*, 502 S.W.2d 66 (Ky. 1973), held that assessing strict tort liability in the case of a defect in *design* is no different than doing so under negligence theory, and the only demand made upon the manufacturer is to use reasonable care in the development of the design. *But see* Ulrich v. Kasco *Abrasives Co.*, 532 S.W.2d 197 (Ky. 1976), in which the Court of Appeals retreated from this extreme view, promulgating a theory of strict tort liability for design defects that was identical to the theory applicable to manufacturing defects.

183. 50 Ohio St. 2d at 317, 364 N.E.2d at 269.

184. A "manufacturing" defect arises when a miscarriage in the production process results in an individual item that fails to conform to an intended design. An example is a can of soup that contains a dead rat. In the case of a "design" defect, however, the product is marketed in the precise form the manufacturer intended, but suffers from an inadequacy that results in injury. The manufacturer will be subjected to considerably more extensive liability in the case of a "design" defect, since an entire line of products may be found defective, rather than a single item that has become harmful because of carelessness in the manufacturing process.

185. A primary rationale for the adoption of strict tort liability was to guard against the unreasonable risk of injury to persons, and it is plain that this risk can be many times greater in the case

The divergence has usually arisen from the inability of the courts to derive a standard of design defectiveness that differs from traditional negligence concepts. The application of reasonable care standards to determine whether a manufacturer will be held strictly liable in tort for the design of a product ignores the fundamental difference between strict tort law and negligence law:

> [T]he basic difference between negligence on the one hand and strict liability for a design defect on the other, is that in strict liability we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did. The article can have a degree of dangerousness which the law of strict liability will not tolerate even though the actions of the designer were entirely reasonable in view of what he knew at the time he planned and sold the manufactured article.[186]

Under strict products liability law, the focus of consideration is the actual condition of the product at the time of sale; considerations of the care employed in preparing the product are inappropriate.[187]

It is difficult to determine whether a particular product is in a "defective condition . . . unreasonably dangerous to the user or consumer"[188] by reason of faulty design. Deans Wade and Keeton have independently arrived at nearly identical conclusions on how to determine whether a "defect" in a strict liability sense is present in a given product.[189] Both men agree that the term "defective" should be used only in the sense of an "unintended condition, a miscarriage in the manufacturing process."[190] It might be said that an improperly designed product is "defective," but it is only defective when it is "unreasonably dangerous."[191] Hence, the determinative test is whether the product was "unreasonably dangerous," or not reasonably safe.[192]

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of an injury-producing defect that affects an entire line of products than the occasional mistake in the manufacturing process. Furthermore, strict liability is often imposed on the original manufacturer because he is the party *best* able to eliminate the risk. In the case of a design defect, the manufacturer may well be the *only* party able to eliminate the risk. Finally, for both "design" and "manufacturing" defects, strict tort liability reaches up the ladder of vertical privity to those parties best able to distribute the costs of these risks among the public. *See* Comment, *Products Liability: Is § 402A Strict Liability Really Strict in Kentucky?*, 61 KY. L.J. 866 (1974).

186. Roach v. Kononen, 269 Or. 457, 465, 525 P.2d 125, 129 (1974).

187. *See, e.g.*, Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966); McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965); MacDougall v. Ford Motor Co., 214 Pa. Super. Ct. 384, 257 A.2d 676 (1969). *See also* RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) & Comment g (1965).

188. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

189. *See* Keeton, *Product Liability, supra* note 5; Keeton, *Manufacturer's Liability: supra* note 3; Wade, *On the Nature of Strict Tort Liability, supra* note 5; Wade, *Strict Tort Liability, supra* note 5.

190. Keeton, *Manufacturer's Liability, supra* note 3, at 562.

191. Wade, *Strict Tort Liability, supra* note 5, at 15.

192. *Id.*

Wade and Keeton reject the Restatement (Second) of Torts formulation that a product is unreasonably dangerous if "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it."[193] Such a test is too nebulous and presupposes a discernable set of ordinary user expectations regarding safety features of complex products about which the ordinary consumer knows little.[194] Furthermore, such an approach ties the availability of the cause of action in tort to the expectations of the consumer. The basis of recovery seems to be that the buyer did not get what he paid for, and is entitled to rescission and restitution or the benefit of his bargain. Dean Wade contends that this is an unacceptable way to conceptualize a tort cause of action.[195]

Deans Wade and Keeton have proposed essentially the same test for ascertaining whether the product is of the requisite degree of dangerousness to be defective. The test begins by assuming that the manufacturer knew of the product's propensity to injure as it did, and then asks whether he was negligent in putting it on the market or supplying it to another.[196] Dean Keeton contends that a product is defective if it is unreasonably dangerous as marketed:

> [A] product ought to be regarded as "unreasonably dangerous" at the time of sale if a reasonable man with knowledge of the product's condition, and an appreciation of all the risks found to exist by the jury at the time of trial, would not now market the product, or, if he did market it, would at least market it pursuant to a different set of warnings and instructions as to its use. Thus, a product is improperly designed if its sale would be negligence on the part of a maker who had full knowledge of all the risks and dangers that were subsequently found to exist in the product, regardless of the excuse that the maker might have had for his ignorance of such dangers. Since the test is not one of negligence, it is not based upon the risks and dangers that the maker should have, in the exercise of ordinary care, known about. It is, rather, danger in fact, as that danger is found to be at the time of the trial that controls.[197]

In accordance with strict products liability theory, the Wade-Keeton test places a greater burden than negligence on the manufacturer, because the law presumes he has knowledge of the product's dangerous propensity that he might not reasonably be expected to have.[198] In essence, such a test vests the hypothetical reasonable man with full knowledge of the product's tendency to injure in the manner it has been alleged to have injured, and asks "whether the magnitude of the risk created by the dangerous condition of the product was outweighed by the social utility attained by putting

193. RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965).

194. *See* Keeton, *Product Liability, supra* note 5, at 37.

195. Wade, *On the Nature of Strict Tort Liability, supra* note 5, at 833.

196. Keeton, *Product Liability, supra* note 5, at 37-38; Wade, *On the Nature of Strict Tort Liability, supra* note 5, at 834-35; Wade, *Strict Tort Liability, supra* note 5, at 15.

197. Keeton, *Manufacturer's Liability, supra* note 3, at 568.

198. *See* Roach v. Kononen, 269 Or. 457, 465, 525 P.2d 125, 129 (1974).

it out in this fashion."[199] This reflects the weighing process by which tort law commonly executes sound social policy.[200]

The Wade-Keeton test is advantageous in many respects. The test reflects the tort nature of the strict products liability action by weighing the risk of an action against its social utility. It discards standards of tort liability that are tied to the expectations of the parties. Although it differentiates between negligence theory and strict products liability theory, the Wade-Keeton test employs traditional concepts of the reasonable man, with which juries have been comfortable. Perhaps most importantly, the test suggests one standard of defectiveness, applicable to "manufacturing" and "design" defects alike. As has often been observed, strict products liability diverges from negligence law principles most markedly when the manufacturing process has gone awry.[201] To put an extreme example in terms of the Wade-Keeton test, the jury would be asked to determine whether the reasonably prudent man would knowingly market a can of soup that contained a dead rat. As to conscious design choices by the ordinary manufacturer, little practical difference exists between negligence and strict products liability concepts.[202] Negligence principles charge the manufacturer with knowledge of the reasonably foreseeable dangers associated with the chosen product design and ask if his action in marketing the product was reasonable, while strict products liability assumes actual knowledge on the part of the manufacturer of the specific danger in issue, and then inquires into reasonableness. Liability standards will thus be similar under both theories in the case of a design choice made knowingly by a competent manufacturer who has assessed the risks of the product he sells. Injury often results from a reasonably foreseeable risk inherent in the product. In that situation negligence

199. Wade, *On the Nature of Strict Tort Liability, supra* note 5, at 835.

200. Dean Wade suggests that the following factors are most relevant in applying this Wade-Keeton standard of unreasonable product danger:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

Wade, *On the Nature of Strict Tort Liability, supra* note 5, at 837-38.

201. Wade, *On the Nature of Strict Tort Liability, supra* note 5, at 836.

202. *See* Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1340-41 (1966); Noel, *Recent Trends in Manufacturers' Negligence as to Design, Instructions or Warning*, 19 SW. L.J. 43 (1965); Prosser, *The Assault, supra* note 3, at 1119; Rheingold, *Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325, 326 n.5 (1971); Wade, *On the Nature of Strict Tort Liability, supra* note 5 at 841; Wade, *Strict Tort Liability, supra* note 5, at 15; Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 GEO. L.J. 286, 323 (1966).

and strict products liability converge. Because the careful manufacturer can usually, by proper testing, identify most risks attendant to use of his product, the Wade-Keeton formulation has been given credit for providing a more certain standard of liability for the manufacturer.[203] In short, Deans Wade and Keeton have fashioned a workable approach to "defect" identification in strict products liability actions, one that pays heed to the tort basis of strict products liability, and provides reasonable limitations upon the liability of product suppliers, yet subjects those suppliers to a greater duty than mere reasonable care in the preparation and marketing of products. The Ohio courts should not hesitate to divorce strict products liability from negligence law duties of due care, and take care to fashion a distinct strict products liability action that embodies the important societal concerns that have compelled its adoption.

V. CONCLUSION

With its opinion in *Temple v. Wean United, Inc.*, the Supreme Court of Ohio has added the strict products liability cause of action to the panoply of weapons available to the injured product user, ridding Ohio law of some of the troublesome features of "implied warranty in tort" doctrine. It seems certain that recovery may now be had from the manufacturer, middleman, or immediate vendor, regardless of the absence or presence of privity, by a showing that a product placed in the stream of commerce by those parties was defective, unreasonably dangerous, reached the user or consumer without substantial change in condition, and proximately caused injury in the course of its ordinary intended use. In asserting liability against a product seller with whom the injured user is not in privity, the plaintiff is no longer required to make the difficult showing that the particular seller failed to exercise reasonable care in the preparation and sale of the product. Nor is the consumer who has sustained bodily injuries or property damage as a result of using a product confined to recovery upon an express or implied warranty against the seller, with the attendant problems of limited privity requirements and the possibility of disclaimer of warranties and limitations upon recoverable damages.

Temple represents a sound development in Ohio's tort law. In view of the weighty public policy foundations that have propelled rapid acceptance of strict products liability doctrine in a majority of American jurisdictions, Ohio courts had been remiss in failing to unequivocally embrace this tort cause of action. The inherent limitations of existing modes of legal recovery necessitate the imposition of a stricter form of

203. *See* Holford, *supra* note 5, at 93. Indeed, in most strict tort liability situations and all negligence suits, the most persistent source of uncertainty for the manufacturer with respect to liability for design choices is that the manufacturer's notions of reasonableness will differ from those of the jury.

liability upon product sellers to insure that consumers are properly protected from defective products that cause physical injury.

The *Temple* court recognized that strict products liability is meant to be divorced from considerations of standards of care, because liability may attach although the seller has exercised all possible care. Nevertheless, the logic of the opinion suggests that alleged defects in the intended design of the product, as opposed to individual manufacturing flaws in isolated goods, may be subjected to a less demanding standard of scrutiny than under strict products liability doctrine. One reading of the case suggests that a showing of a failure to exercise reasonable care on the part of a manufacturer-seller is necessary for liability to attach in strict tort for a defect in the *design* of the product. This approach to products liability cases would impose negligence-based liability standards in the designing of products, while true strict products liability would be the norm in the manufacturing process. Such a bifurcated view of strict products liability doctrine would be highly undesirable; Ohio's courts should seek to shape one standard of truly strict tort liability in appraising the alleged defectiveness of a product, be the shortcoming one arising in the design or the manufacturing process.

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